Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3599

Appeal PA14-170

Ministry of Community Safety and Correctional Services

April 28, 2016

Summary: The appellant and the affected party are involved in a family court case relating to issues of custody and access. Earlier court decisions have left the appellant as a custodial parent, although the children live with the affected party. These decisions also grant him access rights.

The appellant requested access to OPP investigation records concerning allegations that he had committed a criminal offence involving his daughter. No charges resulted from the investigation. The ministry disclosed the records in part, and claims that the portions it decided to withhold are exempt under section 49(b) (personal privacy).

This order finds that the appellant is not entitled to exercise his children's rights to request access or consent to disclosure under section 66(c) of the *Act*. Section 21(1)(d), which indicates that disclosure is not an unjustified invasion of personal privacy where an Act of Canada or Ontario authorizes the disclosure, does not apply in the circumstances of this case. The absurd result principle also does not apply. The withheld portions of the records are exempt under section 49(b).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 1(b), 2(1) (definition of personal information), 21(1)(d), 21(2)(d) and (f), 21(3)(b), 49(b) and 66(c); *Children's Law Reform Act*, R.S.O. 1990, c. C.12, ss. 19(a), 20(5); *Divorce Act*, R.S.C 1985 c. 3 (2nd Supp.), ss. 16(1), (5) and (8); and 17(5).

Orders and Investigation Reports Considered: M-787, MO-1480, MO-3026, P-1618 and PO-2285.

Cases Considered: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27; *Young v. Young*, [1993] 4 SCR 3.

OVERVIEW:

Background

[1] The records at issue in this order relate to an investigation by the Ontario Provincial Police (OPP) into allegations that the appellant committed a criminal offence involving his teen-aged daughter. No charges have resulted from the investigation.

[2] The appellant is divorced from his daughter's mother (who is referred to in this order as the affected party). Neither of the two court orders provided to this office during the inquiry awarded custody to either the appellant or the affected party, and accordingly both remain custodial parents. Both court orders provide that the children of the marriage are to have their primary residence with the affected party, who also has "day to day decision making authority regarding education and medical care of the children." The second court order specifies times during which the appellant was to have access to the children of the marriage, including the daughter.

[3] There are ongoing proceedings in the Superior Court of Justice Family Court Branch (the Family Court) in which the affected party seeks to gain sole custody and to require that the appellant's access be supervised at all times, but to the best of my knowledge, no such order has been granted. I also understand that the appellant has brought a motion within the ongoing family court proceedings for access to the very records that are at issue in this appeal.

[4] In addition to the police investigation of the allegations, as reflected in the records, there was an investigation by a local Child and Family Services agency. This agency's report, which was provided to the appellant and the affected party, indicates that two of the children "provided detailed disclosure which would confirm that the [appellant]'s actions have been sexually inappropriate with [his daughter] compounded with the fact that the children are fearful of [the appellant] and do not wish to have any contact with him." The appellant has not had access to the children since 2013.

The Access Request and the Appeal

[5] The appellant made an access request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). In particular, he requested access to an occurrence report and all related notes, officer's notes and other supplemental reports with a detachment of the Ontario Provincial Police (the OPP) identified in the request. He also sought access to any other occurrence reports from June 24, 2013 to the date of the request and all related notes, officer's notes and any other supplemental reports.

[6] After locating responsive records, the ministry issued a decision granting partial access to them. The ministry advised that access to the withheld portions of the records was denied under the discretionary exemptions in section 49(a) of the *Act*, read with sections 14(1)(l) (facilitate commission of an unlawful act or hamper control of crime) and 14(2)(a) (law enforcement report); and section 49(b) (personal privacy) of the *Act*.

[7] In support of its section 49(b) claim, the ministry raised the application of the presumption in section 21(3)(b) (investigation into a possible violation of law) and the factor in section 21(2)(f) (highly sensitive). The ministry also advised the appellant that it had denied access to other portions of the records on the basis that they are not responsive to his request.

[8] The appellant filed an appeal of the ministry's decision. The appeal was initially assigned to a mediator pursuant to section 51 of the *Act*.

[9] During mediation, the appellant advised that he seeks records relating to alleged incidents involving himself that are the subject of the occurrence report identified in his request. He also indicated that he does not seek access to the parts of the records that were identified by the ministry as not responsive to his request or to the police code information that was withheld under section 14(1)(l) of the *Act*. Accordingly, these parts of the records are no longer at issue. The appellant confirmed that he seeks access to all of the remaining information that has been withheld from disclosure.

[10] As mediation did not resolve all of the issues in this appeal, it was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[11] This office sent a Notice of Inquiry to the ministry, the appellant and the affected party, as well as another individual. Representations were received from the ministry, the appellant and the affected party. The other individual declined to provide representations. Non-confidential portions of the representations were shared in accordance with *Practice Direction 7*, issued by this office. The affected party's representations were not shared with the appellant due to confidentiality concerns. In its representations, the ministry indicated that it no longer relies on section 14(2)(a).

[12] The appeal was then transferred to me to complete the inquiry.

[13] In addition to the exemption claims, the appeal raises the possible application of section 66(c) of the *Act*, which provides that "[a]ny right or power conferred on an individual under this Act may be exercised . . . where the individual is less than sixteen years of age, by a person who has lawful custody of the individual." Because the appellant remains a custodial parent, it is necessary to consider whether section 66(c) entitles him to request, on behalf of his children, access to their personal information in the records at issue or, alternatively, whether he is able to consent, on the children's behalf, to their personal information in the records being disclosed to him. Applying the

modern principle of statutory interpretation, which includes consideration of the purpose of the provision in question, I have concluded that section 66(c) does not apply in the circumstances of this appeal.

[14] In addition, this appeal requires consideration of whether section 16(5) of the *Divorce Act* and/or section 20(5) of the *Children's Law Reform Act*, which provide that access parents have a right to receive certain types of information about their children, apply to the undisclosed parts of the records at issue in the circumstances of this case. If so, previous orders[1] issued by this office indicate that section 21(1)(d) would apply, and in that circumstance, the personal privacy exemption at section 49(b) would not apply. Section 21(1)(d) refers to ". . . an Act of Ontario or Canada that expressly authorizes the disclosure."

[15] Again, applying the modern principle of statutory interpretation, I conclude that in the circumstances of this appeal, section 16(5) of the *Divorce Act* and section 20(5) of the *Children's Law Reform Act* should not be interpreted as express authority for the ministry to provide the undisclosed information in the records to the appellant.

[16] In the result, I conclude that the information remaining at issue in the records is exempt under section 49(b) and this order therefore upholds the ministry's decision. In this circumstance, it is not necessary to consider the application of section 49(a) in conjunction with section 14(1)(l).

RECORDS:

[17] The records at issue consist of the undisclosed portions of an occurrence summary, occurrence report, supplementary occurrence report and officers' notes, to which the appellant continues to seek access.

ISSUES:

[18] The issues addressed in this order are:

A. Does section 66(c) of the *Act* permit the appellant to exercise his children's right of access to their own personal information? Does it entitle him to consent on their behalf to the disclosure of their personal information to him?

B. Do the records contain personal information within the meaning of the definition in section 2 of the *Act* and if so, to whom does it pertain?

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[1] Orders M-787 and MO-3026.

C. Does the discretionary exemption in section 49(b) apply?

D. Should the ministry's exercise of discretion be upheld?

DISCUSSION:

Issue A. Does section 66(c) of the *Act* permit the appellant to exercise his children's right of access to their own personal information? Does it entitle him to consent on their behalf to the disclosure of their personal information to him?

[19] Section 66(c) of the *Act* is intended to allow custodial parents to make access requests on behalf of children under the age of sixteen, and to take other steps on their behalf, such as consenting to the disclosure of information under section 21(1)(a), which permits the disclosure of personal information on the written consent of the data subject. Section 66(c) states:

> Any right or power conferred on an individual under this Act may be exercised,
>
> . . .
>
> (c) where the individual is less than sixteen years of age, by a person who has lawful custody of the individual.

[20] It is apparent that the appellant continues to have lawful custody of the children under sixteen years of age who are mentioned in the records. However, the modern principle of statutory interpretation indicates that in some circumstances, despite the apparent plain or literal meaning of a provision, a more probing reading may cause a different interpretation to be adopted. The Supreme Court of Canada has stated this principle as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[2]

[21] In applying this principle, the Court rejected an interpretation which, despite being in accordance with plain meaning, was:

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[2] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR. 27 at para. 21. The Court is quoting from Elmer Driedger, *Construction of Statute*s (2nd ed. 1983) at p. 87.

> . . . incompatible with both the object of the Act and with the object of the . . . provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. . . . [A]n interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment. . . .[3]

[22] In the midst of a matrimonial dispute, significant context for rights that arise from being a custodial parent is provided by statutes that deal expressly with custody issues, such as the *Divorce Act* and the *Children's Law Reform Act*. In both cases, the best interests of the child or children are an important guiding principle. For example, sections 16(1) and (8) of the *Divorce Act* state:

> (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.
>
> (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

[23] The "best interests" principle is also explained by the Supreme Court of Canada in *Young v. Young*:[4]

> The power of the custodial parent is not a "right" with independent value which is granted by courts for the benefit of the parent, but is designed to enable that parent to discharge his or her responsibilities to the child. It is, in fact, the child's right to a parent who will look after his or her best interests. . . .
>
> It has long been recognized that the custodial parent has a duty to ensure, protect and promote the best interests of the child. That duty includes the sole and primary responsibility to oversee all aspects of day to day life and long-term well-being, as well as major decisions with respect to education, religion, health and well-being.

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[3] The Court is quoting from Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991) at pp. 378-80.

[4] [1993] 4 SCR 3.

[24] This approach is also expressed in section 19(a) of the *Children's Law Reform Act*, which states:

> The purposes of this Part[5] are,
>
> > (a) to ensure that applications to the courts in respect of custody of, *incidents of custody of*, access to and guardianship for children will be determined on the basis of the best interests of the children; [Emphasis added.]

[25] The right to act on behalf of minor children conferred on custodial parents by section 66(c) is clearly an "incident of custody." Section 66(c) indicates that the rights of children under sixteen years of age "may be" exercised by an individual who has lawful custody. In this case, however, where the appellant seeks access to information in order to further his own position in matrimonial proceedings, he is not acting in a custodial capacity.

[26] As well, there is evidence suggesting that the children are fearful of the appellant and do not wish to have any contact with him. In that situation, I find that it would be unreasonable and illogical to interpret section 66(c) in a manner that would permit the appellant to either: (1) exercise the children's right of access to their own personal information, or (2) consent to the disclosure of the children's personal information to himself. The legislature would not have intended that section 66(c) apply in these circumstances, and applying section 66(c) in this case would be inconsistent with the privacy protection purpose of the *Act* set out in section 1(b) as well as the principles expressed in section 16(8) of the *Divorce Act* and section 19(a) of the *Children's Law Reform Act*.

[27] I also note that issues of custody and access are the subject of ongoing proceedings before the Family Court, whose expertise includes the determination of the best interests of the children. Because there is a motion for production of the records in the proceedings, the court can decide whether production is required in order to protect those interests.

[28] In summary, I find that section 66(c) does not apply in the circumstances of this appeal.

Issue B. Do the records contain personal information within the meaning of the definition in section 2 of the *Act* and if so, to whom does it pertain?

[29] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it

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[5] A reference to Part III of the *Children's Law Reform Act*, entitled "Custody, Access and Guardianship."

relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
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> (c) any identifying number, symbol or other particular assigned to the individual,
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> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[30] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[6]

[31] The ministry submits that the records contain personal information, including ". . . names, addresses, phone numbers, and information about or provided by affected parties in connection with the OPP investigation that was undertaken." The appellant also states that he believes that the records contain personal information, including his

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[6] Order 11.

own personal information, and states further that "[t]his information has come to my knowledge . . ." through a variety of means.

[32] I have reviewed the records and find that the undisclosed portions of them contain identifiable information about the appellant, his children, the affected party and several other individuals. Information about the appellant is intertwined with information about other individuals. I find that there is no information pertaining to the appellant only that could be severed and disclosed, other than information that the ministry has already disclosed to him.

Issue C. Does the discretionary exemption in section 49(b) apply?

[33] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[34] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[35] Section 49(b) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where the disclosure would constitute an unjustified invasion of another individual's' personal privacy;

[36] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy.

Section 21(1)

[37] If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). In this case, it is necessary to consider the possible application of sections 21(1)(a) and (d).

[38] These sections state:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
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> > (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

> (d) under an Act of Ontario or Canada that authorizes the disclosure;

Section 21(1)(a) - consent

[39] This section applies if the individual to whom the information relates consents in writing to its disclosure. No individual (other than the appellant) whose personal information appears in the records has consented to disclosure, and I found, above, that section 66(c) does not apply to allow the appellant to consent on behalf of his children under 16 years of age. Section 21(1)(a) therefore does not apply.

Section 21(1)(d): another Act

[40] The appellant submits that section 21(1)(d) applies on the basis of section 20(5) of the *Children's Law Reform Act* and section 16(5) of the *Divorce Act*.

[41] Section 20(5) of the *Children's Law Reform Act* states:

> The entitlement to access to a child includes the right to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child. [Emphasis added.]

[42] Section 16(5) of the *Divorce Act* contains similar wording about access to information. It states:

> Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child. [Emphasis added.]

[43] The ministry submits that section 20(5) of the *Children's Law Reform Act* ". . . does not extend to the records at issue due to their sensitivity, and their contents."

[44] A number of previous orders have applied section 21(1)(d) or its equivalent, section 14(1)(d) of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) on the basis of section 16(5) of the *Divorce Act* and/or section 20(5) of the *Children's Law Reform Act*.

[45] In Order MO-3026, Adjudicator Justine Wai applied section 14(1)(d) *MFIPPA* on the basis of section 20(5) of the *Children's Law Reform Act.* In that case, the records related to an alleged assault on the children of the requester, who was a custodial parent. Specifically, the records consisted of video statements by the children and an occurrence report. In that appeal, the requester was not the individual accused of assaulting the children. Adjudicator Wai found that the records contained information that "can reasonably be viewed to pertain to the 'welfare' of the appellant's children."

[46] In Order M-787, Adjudicator Holly Big Canoe found that section 16(5) of the *Divorce Act* authorized the disclosure of health information about a child to a parent who had a right of access.

[47] Arguably, a plain language reading of section 21(1)(d) in conjunction with section 20(5) of the *Children's Law Reform Act* and/or section 16(5) of the *Divorce Act* would mean that disclosure is not an unjustified invasion of personal privacy and the section 49(b) exemption would therefore not apply. However, as with section 66(c), a more probing reading of these sections may produce a different outcome, in keeping with the modern principle of statutory interpretation.

[48] Both section 16(5) of the *Divorce Act* and section 20(5) of the *Children's Law Reform Act* refer to information about the welfare of children, as well as their health and education. As discussed earlier in this order, an important purpose underlying statutory provisions relating to custody and access is to promote the best interests of children.[7] Moreover, the use of the term "information" in both these sections does not necessarily mean "any and all" information, particularly in circumstances where disclosure may not be in the children's best interests.

[49] In Order MO-1480, Assistant Commissioner Sherry Liang addressed the *MFIPPA* equivalent of section 21(1)(d) and a police occurrence report relating to an alleged assault of the requester's daughter by another individual. She reviewed a number of previous orders and stated:

> The result of these orders is that individuals who are entitled to have access to a child, and therefore to the information described by the CLRA,[8] cannot be prevented from having access to that information because of the provisions of section 14(1) of the Act. *Together, the provisions of the CLRA and this Act express a policy that in these limited circumstances, the welfare of children overrides personal privacy rights*. [Emphasis added.]

[50] However, that order, as well as Orders MO-3026 and M-787, are distinguishable. The records at issue in those orders did not relate to allegations that the individual requesting the information had committed a criminal offence involving their child, as is the case here. Moreover, as already noted, in this case, a local Child and Family Service agency found in its report that "the [appellant]'s actions have been sexually inappropriate with [his daughter]." The appellant has not had access to the children since 2013. There is evidence to suggest that the children are fearful of the appellant

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[7] See section 16(8) of the *Divorce Act* and section 19(a) of the *Children's Law Reform Act*, quoted above in the discussion of section 66(c) of the *Act*.

[8] *Children's Law Reform Act.*

and do not wish to have any contact with him.

[51] The result of applying section 21(1)(d) in this appeal would be disclosure to the appellant of sensitive personal information about the children that appears in a police record. The legislature would not have intended that section 21(1)(d) apply in these circumstances. To find otherwise would be inconsistent with the privacy protection purpose of the *Act* set out in section 1(b) as well as the principles expressed in section 16(8) of the *Divorce Act* and section 19(a) of the *Children's Law Reform Act*, quoted above in my discussion of section 66(c) of the *Act*.

[52] I have therefore concluded that the circumstances of this appeal differ significantly from the circumstances described in Order MO-1480 where Assistant Commissioner Liang found that "the welfare of children overrides privacy rights." It is far from clear that disclosure of the records would be in the children's best interests and I therefore find it would be an unreasonable and illogical interpretation to read section 21(1)(d), in conjunction with section 20(5) of the *Children's Law Reform Act* and/or section 16(5) of the *Divorce Act*, as authority to disclose the withheld information.

[53] Moreover, the appellant has brought a motion for production of this same information in the Family Court proceedings. In my opinion, it would be preferable for the Family Court to determine that issue, rather than for this office to order the information disclosed under the *Act*. The best interests of the children are a paramount consideration, and one which the Family Court, with its expertise on such questions, and with more up-to-date information about the circumstances of the children than I have in my possession, is much better positioned to determine.

[54] For all these reasons, I find that section 21(1)(d) does not apply.

Sections 21(2) and (3)

[55] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.[9]

[56] I will begin by considering section 21(3), which lists circumstances where disclosure is presumed to be an unjustified invasion of personal privacy. The ministry relies on section 21(3)(b).

21(3)(b): investigation into violation of law

[57] Section 21(3)(b) states:

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[9] Order MO-2954.

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

[58] Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[10]

[59] The ministry states:

> These records were created pursuant to a law enforcement investigation. If the evidence gathered during the investigation had pointed in a different direction, charges could have been laid by the OPP, most likely pursuant to the *Criminal Code*. As a result, the Ministry submits that the records fall squarely within the presumption in section 21(3)(b).

[60] The appellant submits that the presumption does not apply because he is the party being investigated. I note, however, that section 49(b) (which is the exemption currently under consideration, informed by the provisions of section 21) applies if disclosure "would constitute an unjustified invasion of another individual's personal privacy." [Emphasis added.] I have already found that the ministry has severed and disclosed all of the appellant's personal information that was not intertwined with the personal information of others.

[61] Both section 49(b) and section 21(3)(b) aim to protect the privacy of individuals other than the requester (the appellant in this case). Section 21(3)(b) is therefore relevant despite the fact that the appellant is the individual who was under investigation. This approach is consistent with previous decisions of this office such as Order PO-2285, which applied section 21(3)(b) to police records relating to an investigation of the requester in that case, who was ultimately charged with uttering threats.

[62] I accept the submission of the ministry that the records were compiled and are identifiable as part of an investigation into a possible violation of law. I therefore find that the presumed unjustified invasion of privacy in section 21(3)(b) applies.

[63] As no other provision in section 21(3) applies, I will now consider section 21(2).

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[10] Orders P-242 and MO-2235.

Section 21(2)

[64] Section 21(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy. The ministry relies on section 21(2)(f) (highly sensitive) as a factor favouring non-disclosure. The appellant disputes the application of section 21(2)(f) and relies on the factor favouring disclosure in section 21(2)(d) (fair determination of rights).

[65] Sections 21(2)(d) and (f) state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (f) the personal information is highly sensitive;

Section 21(2)(d) – fair determination of rights

[66] For section 21(2)(d) to apply, the appellant must establish that:

1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing [11]

[67] The appellant and affected party have provided documentation demonstrating the existence of Family Court proceedings relating to custody and access, meeting the first two requirements for the application of section 21(2)(d).

[68] The appellant submits that "[t]he information in this report may be relevant in

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[11] Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

determining my rights in family court." He states that "[d]isclosing the report is the only way to have the facts available to the court before and during the trial." This provides some evidence to find that the third and fourth requirements are established.

[69] As noted previously, the appellant has brought a motion for production of the records at issue during the proceeding. Presumably, the Family Court will apply the test of relevancy in determining the outcome of this motion. The Family Court is in a much better position than I am to determine whether the records at issue are relevant to the proceedings before it, and if it considers the records necessary, they will be ordered to be produced. This reduces the weight that should be ascribed to section 21(2)(d).

[70] Accordingly, I find that the factor favouring disclosure at section 21(1)(d) is established, and I accord it moderate weight.

Section 21(2)(f) – highly sensitive

[71] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[12]

[72] The ministry and the affected party submit that the undisclosed information in the records is highly sensitive. The ministry refers to Order P-1618, in which former Assistant Commissioner Tom Mitchinson found that personal information about the affected parties' contacts with the OPP as complainants, witnesses or suspects qualified as "highly sensitive."

[73] The appellant submits that ". . . the report should not cause any of the involved parties any level of personal distress and therefore the information disclosed should not be considered 'highly sensitive.'"

[74] Police investigations such as the one reflected in the records at issue delve into intimate, highly personal matters. It is clear that, under the circumstances, disclosure of the records could reasonably be expected to cause significant personal distress to the affected party and the children mentioned in the records. Regardless of what the appellant knows or does not know about the contents of the records, I find that the factor in section 21(1)(f) applies, and I accord it significant weight.

Conclusions under sections 21(2) and (3)

[75] I have found that the presumed unjustified invasion of personal privacy under section 21(3)(b) is established in this case. As well, I have found that the factor favouring non-disclosure in section 21(2)(f) (highly sensitive) applies, and have given it significant weight. The factor favouring disclosure in section 21(2)(d) (fair

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[12] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

determination of rights) also applies, and I have given it moderate weight.

[76] The combined application of a presumption [section 21(3)(b)] and a factor favouring non-disclosure with significant weight [section 21(2)(f)] outweighs the factor favouring disclosure to which I have afforded moderate weight [section 21(2)(d)]. Accordingly, subject to the discussion of the absurd result principle and the exercise of discretion, below, I find that disclosure of the withheld portions of the records at issue would constitute an unjustified invasion of personal privacy, and the records are therefore exempt under section 49(b).

ABSURD RESULT

[77] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 49(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.[13]

[78] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement[14]
- the requester was present when the information was provided to the institution[15]
- the information is clearly within the requester's knowledge[16]

[79] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[17]

[80] The appellant submits that the absurd result principle applies because ". . . there is little to no invasion of privacy in the disclosing of this report." He also mentions that the record includes a statement he made to a Children's Aid Society that was then forwarded to another child protection agency and subsequently passed on to the OPP. The records include notes of a conversation with a representative of the child protection agency that contain particulars of the allegations against the appellant.

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[13] Orders M-444 and MO-1323.

[14] Orders M-444 and M-451.

[15] Orders M-444 and P-1414.

[16] Orders MO-1196, PO-1679 and MO-1755.

[17] Orders M-757, MO-1323 and MO-1378.

[81] The ministry submits that the absurd result principle should not apply in this case ". . . because disclosure would be inconsistent with the purpose of the exemption, to protect the privacy of affected parties whose personal information has been collected as part of a police investigation."

[82] I have already observed that the ministry has disclosed the severable information in the records that pertains only to the appellant. The withheld information relating to the appellant is intertwined with information about other identifiable individuals.

[83] As already noted, previous orders have applied the absurd result principle to witness statements that have been provided by the individual requesting access, and to other information clearly within the requester's knowledge.

[84] In Order PO-2285, Assistant Commissioner David Goodis dealt with the absurd result principle in a case where the appellant had requested police records relating to an investigation into whether he had uttered threats against his wife. Referring to several previous orders, he stated:

> Although the appellant may well be aware of much, if not all, of the information remaining at issue, this is a case where disclosure is not consistent with the purpose of the exemption, which is to protect the privacy of individuals other than the requester. In my view, this situation is similar to that in my Order MO-1378, in which the requester sought access to photographs showing the injuries of a person he was alleged to have assaulted:
>
> > The appellant claims that the photographs should not be found to be exempt because they have been disclosed in public court proceedings, and because he is in possession of either similar or identical photographs.
>
> In my view, whether or not the appellant is in possession of these or similar photographs, and whether or not they have been disclosed in court proceedings open to the public, the section 14(3)(b) presumption may still apply. In similar circumstances, this office stated in Order M-757:
>
> > Even though the agent or the appellant had previously received copies of [several listed records] through other processes, I find that the information withheld at this time is still subject to the presumption in section 14(3)(b) of the Act.
>
> In my view, this approach recognizes one of the two fundamental purposes of the Act, the protection of privacy of individuals [see section 1(b)], as well as the particular sensitivity inherent in records compiled in a law enforcement context. The appellant has not persuaded me that I should depart from this approach in the circumstances of this case.

> As in this previous case, I find that there is particular sensitivity inherent in these records, and that disclosure would not be consistent with the purpose of the exemption, and the absurd result principle therefore does not apply.

[85] This reasoning applies equally in this appeal, given that the records outline the highly personal details of an allegation that the appellant may have committed a criminal offence involving a child. I find that the absurd result principle does not apply.

[86] Accordingly, subject to the discussion of the exercise of discretion, below, I find that the withheld information in the records is exempt under section 49(b).

Issue D. Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

[87] The section 49(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[88] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[89] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[18] This office may not, however, substitute its own discretion for that of the institution.[19]

[90] The ministry submits that its exercise of discretion to withhold information under section 49(b) was proper. The ministry notes that it did disclose information to the appellant, and that it decided to withhold the undisclosed information based on the following considerations:

- the public policy interest in protecting the privacy of personal information belonging to affected parties that is contained in law enforcement records;

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[18] Order MO-1573.

[19] Section 54(2).

- the public policy interest in safeguarding the privacy of individuals who seek out the protection of law enforcement; and

- the concern that the disclosure of records would jeopardize public confidence in the OPP, especially in light of the public co-operation that the OPP depend upon when they conduct law enforcement investigations.

[91] The appellant submits that the police did not exercise their discretion, and that non-disclosure is not in the best interests of the children.

[92] With respect to the appellant's submissions, I have already observed that it is far from clear that disclosure would be in the best interests of the children. I also noted that the Family Court is dealing with the custody and access issues in the proceedings between the appellant and the affected party, has expertise in that regard and is in a better position to determine that issue and to decide whether the records at issue ought to be produced within that litigation.

[93] It is evident from the overall submissions of the police that they were aware of the sensitivity of the information in the records and the need to protect the privacy interests of the individuals other than the appellant who are mentioned.

[94] In the circumstances of this appeal, I find that the ministry's exercise of discretion took relevant factors into account, and was proper.

[95] Accordingly, the withheld information in the records at issue is exempt under section 49(b).

ORDER:

I uphold the ministry's decision.

Original Signed by: April 28, 2016
John Higgins
Adjudicator